QUESTIONS PRESENTED

1. Do false statements to FBI agents during an informal investigative interview constitute obstruction of justice within the meaning of 18 U.S.C. § 1503?

2. Does disclosure of the existence of a wiretap authorization that has expired constitute a violation of 18 U.S.C. § 2232(c)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-270

THE UNITED STATES OF AMERICA

v.

ROBERT P. AGUILAR

BRIEF OF RESPONDENT

STATEMENT

On April 19, 1994, a unanimous eleven-member, *en banc* panel of the Ninth Circuit reversed the conviction of respondent Robert P. Aguilar, a judge of the United States District Court for the Northern District of California, for obstruction of justice in violation of 18 U.S.C. § 1503. Nine of the eleven panel members also agreed to reverse Judge Aguilar's conviction for disclosure of a wiretap authorization in violation of 18 U.S.C. § 2232(c). In each instance, the Ninth Circuit ruled that the record did not establish a violation of the statute.

A. History Of The Proceedings Below

Judge Aguilar was charged originally in an eight-count indictment along with Michael Rudy Tham ("Tham") and Abie Chapman ("Chapman") on June 13, 1989. The centerpiece of the charges against Judge Aguilar was that he violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), by obstructing the affairs of the U.S. District Court for the Northern District of California through a pattern of racketeering activity. The government charged Judge Aguilar, Tham and Chapman with one count of conspiracy to deprive the United States of its governmental rights and functions and to obstruct justice in connection with Tham's *habeas corpus* petition before the Honorable Stanley Weigel in violation of 18 U.S.C. § 371, and with one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The government also charged Judge Aguilar alone with three additional violations of 18 U.S.C. § 1503; and two counts of unlawful disclosure of an application for a wiretap authorization in violation of 18 U.S.C. § 2232(c). *See* Pet. 4a, 30a.[1]

On March 19, 1990, a jury acquitted Judge Aguilar of one count of obstruction of justice, but was unable to reach a verdict on the remaining counts. The district court accordingly declared a mistrial. The district court later granted the unopposed motion of the government to dismiss with prejudice the RICO charge and one obstruction of justice count against Judge Aguilar and also granted the

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[1] Citations will appear as follows: Brief for the United States ("Gov't Br."); Petition for a Writ of Certiorari ("Pet."); Appendix to the Petition for a Writ of Certiorari ("Pet. App."); Joint Appendix ("J.A."); Brief in Opposition ("Opp. Cert."); Trial Exhibits ("Exh."); and Trial Transcripts ("Tr.").

unopposed motions of Tham and Chapman for severance. A second jury acquitted Judge Aguilar of all counts connected with the underlying conspiracy to influence Judge Weigel, one wiretap disclosure count and one count of obstruction of justice, but convicted him of one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 and of unlawfully disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c). *Id.* at 4a-5a, 30a, 67a-68a; 15 Tr. 1590-91.

A divided panel of the Ninth Circuit reversed the obstruction of justice conviction and affirmed the wiretap disclosure conviction. Pet. App. 29a-113a. A majority concluded that, as to both counts, the district court erroneously relieved the government of its burden to prove beyond a reasonable doubt the element of knowledge, essential to both counts of conviction, by requiring the government to establish only what Judge Aguilar "probably" knew. *Id.* at 77a-90a, 100a-101a, 102a, 104a-105a. A different majority found that the erroneous jury instruction was harmless as to the wiretap disclosure conviction. *Id.* at 51a-52a, 103a-104a.

On rehearing *en banc*, the Ninth Circuit did not find it necessary to reach the knowledge issue. *Id.* at 25a. Instead, the court reversed both counts on the grounds that the conduct did not violate the statutes under which it was charged. *Id.* at 1a-28a. The eleven *en banc* panel members agreed unanimously that the government had not identified a violation of Section 1503. The court affirmed that there was "no evidence that a grand jury had authorized or directed the FBI investigation, [or] . . . that the FBI agents had been subpoenaed to testify." *Id.* at 18a. Thus, "[t]he conduct alleged was interference with an FBI investigation, not a judicial proceeding." *Ibid.* The court held that "interference with an FBI investigation" by making false statements during an informal interview did not obstruct or

impede a pending judicial proceeding in violation of Section 1503. *Id.* at 18a-24a.

The *en banc* court also held, over the dissent of only two of its members, that the alleged conduct failed to establish that Judge Aguilar had violated 18 U.S.C. § 2232(c). *Id.* at 8a-15a; 25a-28a. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception.'" *Id.* at 9a (quoting 18 U.S.C. § 2232(c)). Since the government charged Judge Aguilar with attempting to give notice of an authorization to intercept certain electronic communications that had expired more than eight months before the disclosure, *id.* at 5a-8a, the government failed to establish a violation of Section 2232(c). *Id.* at 15a.

B. Statement Of The Facts

The facts relevant to the questions of statutory interpretation presented to the Court are few. Rather than state the pertinent facts, however, the government once again finds it necessary to misuse evidence connected with the conspiracy and obstruction charges of which Judge Aguilar was acquitted. *See* Gov't Br. 4-8. As we have noted before, Opp. Cert. 4-5 & n.1, these digressions are irrelevant. To the extent that they luridly portray supposed facts relating only to the counts of acquittal, they are offensive and demean the process by which they were found insufficient. Because the government's "Statement" is

unnecessarily burdened by this extraneous matter, respondent finds it necessary to re-state the pertinent facts.

1. Events Related to the Section 2232(c) Charge

This case arises out of a prolonged, extensive and ultimately fruitless FBI probe of possible labor racketeering activities by the late Abie Chapman, then an 83-year old relative of Judge Aguilar with a criminal record, and Rudy Tham. 4 Tr. 669; 7 Tr. 966, 982. On April 20, 1987, the FBI obtained an authorization signed by Judge Robert Peckham of the United States District Court for the Northern District of California for a 30-day wiretap on phones used by Tham. Chapman was named on the application as someone whose conversations might be intercepted. The wiretap expired without renewal on May 20, 1987, and on May 21, 1987 Judge Peckham signed an order terminating the wiretap. 7 Tr. 917-919, 929, 933-35; Pet. App. 5a. While there is evidence in the record that subsequent wiretaps were authorized on Tham's phones, *see* Gov't Exh. 1B, there is no evidence in the record that Chapman was named as an interceptee of these subsequent wiretaps or that the April 20 wiretap was ever extended or reauthorized.[2]

On July 9, 1987, an FBI agent assigned to Chapman observed Judge Aguilar eating lunch with Chapman. 7 Tr. 964-69. On August 5, 1987, the Special Agent in charge of the FBI's San Francisco office visited Judge Peckham and told him that Judge Aguilar had been seen in Chapman's company. 7 Tr. 920, 938, 986, 1010.

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[2] Many of the facts in this Statement of the Facts are drawn directly from the *en banc* panel's opinion, which, except for its statement that Chapman was listed as an interceptee on the subsequent wiretaps, adequately and accurately sets forth the relevant facts. *See* Pet. App. 2a-7a, 16a.

Four days later, Judge Peckham met Judge Aguilar at a social function and told him that Abie Chapman's name had come up "in the course of" or "in connection with" a wiretap application. 7 Tr. 921, 942. Judge Aguilar responded that he "[knew] the old man." 7 Tr. 921, 942-43; *see also* 9 Tr. 1213-14. In fact, Chapman was married to Josephine Knaack, an old friend of the Aguilar family and the mother of Judge Aguilar's sister-in-law. 5 Tr. 821-22; 9 Tr. 1207-08. Judge Aguilar had no other knowledge of the application to intercept Tham's calls, which had by then already expired, and no further conversations with Judge Peckham on this subject. *See* Pet. App. 69a, 88a.

Six months later, on February 6, 1988, Chapman invited himself to Judge Aguilar's home. After a few minutes and two drinks, Chapman got up to leave. As Judge Aguilar walked outside with Chapman, he noticed a man holding a camera and attempting to conceal himself from Judge Aguilar in a car across the street. When Chapman drove away, the man followed. 5 Tr. 802-03, 815; 9 Tr. 1256-58, 1328-29; Pet. App. 7a.

Judge Aguilar called his nephew, Steve Aguilar (Marilyn Knaack Aguilar's son) and asked him to come over. 5 Tr. 821-23; 9 Tr. 1271, 1328; Pet. App. 7a. When Steve Aguilar arrived, Judge Aguilar told him that he had seen an FBI agent following Chapman and that he heard at work that telephones might be tapped. He asked Steve to go to his mother's house and personally tell Chapman that he did not want Chapman to call or visit him any more. Steve Aguilar relayed the message. 5 Tr. 824-26, 832; 9 Tr. 1272-73; Pet. App. 7a. There was no evidence that Chapman's phone lines were ever tapped, and the only wiretap of which Judge Aguilar might have had knowledge had expired eight months before. Pet. App. 7a.

2. *Events Related to the Section 1503 Charge*

In late 1987, Chapman and the late Edward Solomon, whom Judge Aguilar knew from law school, visited Judge Aguilar's house with a Section 2255 petition collaterally attacking Tham's conviction for embezzlement, which was then pending before Judge Weigel, Judge Aguilar's colleague. 4 Tr. 602-03, 606, 608, 611, 643; 9 Tr. 1206, 1215-17. Judge Aguilar looked at the motion, advised Solomon (who was representing Tham) to get the case on the calendar, and stated that Judge Weigel would give Solomon a "fair shot" on the motion. 4 Tr. 611-13, 646, 651-54, 719-27; 9 Tr. 1215-20.

Although Judge Aguilar inquired of Judge Weigel concerning the status of the Section 2255 petition, Judge Weigel testified unequivocally that Judge Aguilar made no attempt to influence his ruling on the petition. 9 Tr. 1224-28, 1236-37, 1249; Pet. App. 4a. The jury agreed, acquitting Judge Aguilar of the charge that he conspired with Tham, Solomon and Chapman to influence Judge Weigel. Pet. App. 4a.

Unlike the jury, the FBI did not believe Judge Weigel when he told them that Judge Aguilar had not acted improperly. Instead, the FBI pressed him to wear a tape recording device to a luncheon that he was to attend with Judge Aguilar in order to record any statement Judge Aguilar made to him. Judge Weigel was highly incensed at the FBI's request and he refused. 9 Tr. 1240-42. Judge Weigel then recused himself from Tham's petition, which he had preliminarily decided to deny, not because of questionable conduct by Judge Aguilar, but because the FBI's intervention left him no choice. 9 Tr. 1236, 1245.

On May 10, 1988, the FBI approached Solomon, told him that his phones had been tapped, and accused him of obstruction of justice. 4 Tr. 617, 669-74. Solomon

subsequently wore a recording device to two meetings with Judge Aguilar in an attempt to elicit information for the FBI. 4 Tr. 617, 684-85, 687-88; 8 Tr. 1102; *see* J.A. 5-63. Based on these conversations, the government also charged that Judge Aguilar violated 18 U.S.C. § 1503 by attempting to induce Solomon to testify falsely. The jury acquitted Judge Aguilar of this charge as well. Pet. App. 4a; 15 Tr. 1591.

By virtue of the wiretaps, Solomon's cooperation, the recorded conversations between Judge Aguilar and Solomon, and the interview of Judge Weigel, the FBI was familiar with all the relevant facts concerning Judge Aguilar's relationship with Solomon and Chapman and whether Judge Aguilar had attempted to intervene with Judge Weigel. J.A. 67-68. Nevertheless, on June 22, 1988, two FBI agents interviewed Judge Aguilar on these subjects for no apparent purpose other than to induce Judge Aguilar to make false statements. "There [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. App. 18a.

Judge Aguilar explained to the agents that he was asked by someone, probably Chapman, to find out when there would be a hearing on a motion, and that Judge Aguilar had done so. J.A. 67-71, 81-82. In response to an agent's question, Judge Aguilar told them that he had known Solomon since 1955, J.A. 73, and that he had found out recently that Solomon was Tham's attorney. J.A. 73. Judge Aguilar said that he did not discuss the Tham matter with Solomon, J.A. 74, 81, and that he did not find out or learn of any wiretap order on Chapman. J.A. 83-84. The jury found at least one of these statements to be false.

During the interview, Judge Aguilar repeatedly sought to determine whether a grand jury was reviewing the issues that were the subject of the FBI interview and the

agents rebuffed or evaded his questions. *See* J.A. 64-95. Throughout the colloquy that included the statements found to be false, neither the agents nor Judge Aguilar mentioned a pending grand jury proceeding, although Judge Aguilar asked the agents whether he was a target of their investigation. *After* the false statements were made, Judge Aguilar asked again whether he was a "target." On this occasion, an agent answered with a confusing response about grand jury proceedings, but did not directly confirm that a grand jury was meeting, that Judge Aguilar was a subject of its inquiry, or that they were working on behalf of the grand jury. *See* J.A. 86-87. Judge Aguilar later testified that "*[a]fter* the interview was over" it was his "*impression*" that his statements would be reported to the grand jury. 9 Tr. 1360 (emphasis added).

SUMMARY OF ARGUMENT

In the face of unmistakable evidence that Congress has repeatedly sought to narrow the scope of 18 U.S.C. § 1503 as it applies to witnesses, petitioner asks this court dramatically to expand it. Turning its back on statutes that have traditionally and explicitly addressed false statements to FBI agents during informal investigative interviews, the government seeks instead for the first time to employ the "omnibus clause" of Section 1503, on the theory that the agents were "potential" grand jury witnesses whose hearsay testimony, if false, might impede the grand jury. Petitioner's efforts are unsupported by precedent, the language of the statute, the statutory scheme of which it is part, the relevant legislative history, or even the need to protect the integrity of the grand jury or of FBI investigations. The Ninth Circuit *en banc* correctly and unanimously concluded that such conduct does not and has never fallen within the proper scope of Section 1503.

Before Judge Aguilar's prosecution, *no* court had ever applied Section 1503 to false statements to FBI agents as potential grand jury witnesses. To the contrary, courts interpreting Section 1503 in this setting have consistently required the government to demonstrate a nexus between the wrongful act and the lawful exercise of the grand jury's authority. These decisions, as well as others construing Section 1503, have recognized the need to interpret the "omnibus clause" in accordance with its own terms, the specific prohibitions of Section 1503, and the unified statutory scheme of which it forms a part. Petitioner turns its back on language, statute and context, and argues instead that the "omnibus clause" subsumes *any* conduct, however far removed from the administration of justice, that might conceivably have an effect on a judicial proceeding. That interpretation, while perhaps broad enough to encompass the conduct charged here, would suck into a statutory vacuum the specific prohibitions of Section 1503, as well as most of the remaining offenses enumerated in Sections 1501 through 1515.

Whatever appeal such an interpretation may once have had, it was foreclosed in 1982 with the passage of the Victim Witness Protection Act, through which Congress removed all references to witnesses from Section 1503 and enacted Section 1512 to address all forms of obstruction related to witnesses. The VWPA, and all of the relevant legislative history, confirm that Congress never intended the "omnibus clause" of Section 1503 to be applied to conduct, such as false statements to witnesses, that is expressly addressed by specific provisions of Section 1512.

The Ninth Circuit also correctly held that 18 U.S.C. § 2232(c) does not prohibit the disclosure of wiretaps that have expired. The language of Section 2232(c) is unambiguous; it applies only to the disclosure of interceptions that are "possible." The knowledge and intent

requirements of Section 2232(c) confirm that the statute was intended to protect the secrecy of authorizations to intercept electronic communications while they are in effect or while applications are pending. Once a wiretap has expired, however, interception is no longer "possible" and Section 2232(c) no longer prohibits its disclosure.

Without support from the language of the statute, the decisions of other courts, or even meaningful legislative history, petitioner asks the Court to reject this conclusion, which conscientiously comports with the statute's express terms, in favor of a result born of wishful thinking. While it is possible to imagine a broader statute, addressing different interests, and employing other terms, Congress did not enact it.

I. FALSE STATEMENTS TO FBI AGENTS DO NOT CONSTITUTE A VIOLATION OF 18 U.S.C. SECTION 1503

A. The Unanimous *En Banc* Court Correctly Held That Section 1503 Does Not Reach False Statements Made To FBI Agents

Section 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror

> in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis supplied). The government and some courts have referred to the highlighted text as the "omnibus clause." Gov't. Br. 16; *see e.g. United States v. Marrapese*, 826 F.2d 145, 148 (1st Cir.), *cert. denied*, 484 U.S. 944 (1987). Judge Aguilar was charged with "corruptly endeavor[ing] to influence, obstruct, and impede . . . the due administration of justice," J.A. 106, under the terms of that clause.

In addressing the application of Section 1503 to the conduct alleged to have been engaged in by Judge Aguilar, the petitioner marches through a desultory exposition of the elements of the offense of obstruction, as though the issue in this case were the sufficiency of the evidence, rather than the straightforward question of statutory construction resolved unanimously by the *en banc* Court. *See* Gov't Br. 16-21. In order to obtain a conviction for obstruction of justice, the government preliminarily must prove that there was a judicial proceeding pending of which the defendant had knowledge at the time of the alleged obstruction and that the defendant had a specific intent to obstruct that proceeding.

Pettibone v. United States, 148 U.S. 197, 204-05 (1893) (construing predecessor to Section 1503). But proof of these elements of an offense under Section 1503 is not at issue here.[3]

On the question petitioner posed to the Court -- whether false statements to FBI agents who are potential grand jury witnesses constitute an endeavor to obstruct justice under Section 1503 -- petitioner strikes only a glancing blow. Petitioner's reticence is hardly surprising, since it cannot articulate a consistent theory of how such conduct might have influenced the grand jury, much less whether the statute reaches that far. At times, petitioner contends that Judge Aguilar, aware that a grand jury may receive hearsay testimony, intended to obstruct the grand jury's functions by conveying false testimony to the grand jury through the medium of the potential FBI hearsay declarants. Gov't Br. 21. This attenuated series of connections, the petitioner contends, differs only incidentally from the direct "submission of false or misleading documents or testimony to a grand jury," punishable under Section 1503. *Id.* Elsewhere, however, petitioner asserts that Judge Aguilar intended through his false statements to "avoid

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[3] The last court to speak on the issue held that the government had not proven that Judge Aguilar had knowledge of the grand jury proceedings, because the trial court, at the government's insistence and over the defendant's objection, gave a jury instruction that erroneously equated knowledge with an "aware[ness] of a high probability of the existence of [a] circumstance" and impermissibly lowered the government's burden of proof. Pet. App. 77a-90a, 100a-101a, 102a, 104a-105a. The *en banc* court did not find it necessary to reach this issue. *Id.* at 25a. Should the *en banc* court's decision be reversed, the validity of the knowledge instruction once again will be dispositive. In any event, petitioner's repeated references to what Judge Aguilar "knew" are colored by the government's failure at trial to establish those facts as required by law. We treat these facts as established only for the limited purpose of the questions presented here.

testifying himself before the grand jury," Gov't Br. 19, apparently by indirectly discouraging the grand jury from seeking to compel him to appear personally before it.

What these theories share is the premise that the so-called "omnibus clause" of Section 1503 extends to any conduct that, washed downstream on a current of causation, might potentially influence the grand jury's deliberations. Right or wrong as a matter of epistemology, the petitioner's premise enjoys scant support from prior judicial decisions or the terms of the statute, and it is inconsistent with the statutory scheme of obstruction statutes. To our knowledge, prior to this case no court had ever held that a mere false statement to an FBI agent or potential witness constituted a violation of Section 1503. The absence of precedent flows from the terms of the statute, which do not encompass "potential" witnesses, and certainly do not reach mere false statements to "potential" witnesses. If the scope of the "omnibus clause" is held to be as vast as the government claims, it will engulf many of the other obstruction statutes that Congress has deliberately enacted and carefully tailored to address specific harms. The government's reach has exceeded the statute's grasp.

1. Section 1503 Never Has Been Held to Apply to False Statements to Witnesses Absent a Direct Nexus Between The Witness and a Judicial Proceeding

This is not the first time that the government has sought to use Section 1503 to punish efforts to obstruct a criminal investigation on the theory that the conduct might, in addition, also interfere with the grand jury. The decision of the Ninth Circuit in this case is consistent with all prior decisions applying Section 1503 in these circumstances, including every case identified by the government: every

single court to construe Section 1503 in this setting has required a direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority.[4]

The courts have rebuffed efforts to shoehorn within Section 1503 conduct that does not implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents.[5] In striving to maintain the requirement of a direct nexus, the Courts have refused to employ Section 1503 even in circumstances where the allegedly wrongful conduct might theoretically influence the evidence ultimately received by the grand jury. For example, in *United States v. Brown*, 688 F.2d 596, 597 (9th Cir. 1982), the Court of Appeals reversed the conviction of a police officer under Section 1503 for attempting to warn the target of a valid search warrant in order to prevent the seizure of a quantity of heroin. In *Brown*, there was the possibility that the fruits of the search might be presented to the grand jury and therefore the risk that interference with the search would impede the

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[4] *See, e.g. United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), (false testimony to the grand jury), *cert. denied*, 475 U.S. 1019 (1986); *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984) (alteration of documents subpoenaed by grand jury); *United States v. Shoup*, 608 F.2d 950, 959-63 (3d Cir. 1979) (falsification of evidence by contractor hired to assist grand jury investigation); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of documents subpoenaed by grand jury).

[5] *See United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("the obstruction of a government agency's investigation is insufficient to trigger § 1503"); *United States v. Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (obstruction of an FBI investigation does not violate Section 1503); *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.) (same), *cert. denied*, 439 U.S. 831 (1978); *United States v. Scoratow*, 137 F. Supp. 620, 621-22 (W.D. Pa. 1956).

grand jury. Nevertheless, emphasizing that defendant's conduct was "unlike that in any other reported case where a conviction under § 1503 has resulted," the Court of Appeals reversed the conviction, reaffirming the general rule that "obstruction of a government agency's investigation" is insufficient to trigger Section 1503. *Id.*

While this case was pending, two other Circuits were faced with prosecutions under Section 1503 for false statements made to FBI agents. Their decisions are likewise consistent with this rule. In *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993), the Court of Appeals reversed a conviction under Section 1503 for false statements to investigating agents of the FBI. The court recognized the possibility, as in *Brown*, that false statements to the FBI might "'arguably interfer[e] with some aspect of the administration of justice. . .'" It found, however, that "the nexus to the progress of a judicial proceeding is too attenuated and the statutory construction therefore too strained'" to be a violation of Section 1503. *Id.* at 696 (*quoting United States v. Walasek*, 527 F.2d 676, 679 (3d Cir. 1975)). After distinguishing many of the cases on which petitioner relies in this case, the court concluded that "defendant's unsworn exculpatory statements given in his own office to interviewing FBI agents did not have the natural and probable effect of impeding the due administration of justice in the sense required by 18 U.S.C. § 1503." *Id.* at 697.

Even the decision of the Court of Appeals for the Fourth Circuit in *United States v. Grubb,* 11 F.2d 426 (4th Cir. 1993), upholding a conviction under Section 1503 for false statements to an FBI agent, is consonant with the requirement of a nexus between the false or misleading conduct and the exercise by grand jury of its authority. In *Grubb*, the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI

. . . ", *Id.* at 436 n. 15, and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." *Id.* at 436. By contrast, the Court of Appeals below found that "[t]here [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. App. 18a.[6]

Petitioner's effort to sidestep the requirement of a nexus between the "potential" witness and a judicial proceeding would dramatically expand the scope of Section 1503. Because "it is usually the task of the United States Attorney's office, with the help of such agencies as the FBI, to amass and coordinate evidence to be presented to the grand jury," *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984), FBI agents, as well as other government investigators, are *always* potential grand jury witnesses. And because the grand jury is free to receive virtually any probative evidence, *Costello v. United States*, 350 U.S. 359 (1956), including summary hearsay testimony by investigators and agents, *any* interference with the FBI's evidence-gathering function necessarily exerts a potential influence on the grand jury. If accepted, that argument might perhaps be broad enough to sweep Judge Aguilar's statements within Section 1503. But invoking Section 1503 merely because an investigative agent might, at some unspecified time, be called upon to convey the fruits of his investigation to the grand jury would sweep in virtually every false statement in the course of a law enforcement investigation.

What is more, because any person with whom the target of an investigation discusses pertinent facts may also

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[6] To the extent that *Grubb* is inconsistent with *Wood* and the decision below, respondent respectfully submits that it was wrongly decided.

be deemed a "potential" witness, petitioner's construction of Section 1503 would expand the scope of the statute to encompass virtually any false statement by a putative defendant to any person.[7] The consistent holdings of the courts construing Section 1503 make clear that such a result extends the statute far beyond its existing or intended scope. The expansion of the "omnibus clause" that petitioner urges is entirely unmoored to any suggestion that it is necessary to protect the legitimate functions of the grand jury or of law enforcement. False statements to FBI agents have long been punished under 18 U.S.C. § 1001;[8] and, since 1982, under appropriate circumstances, false statements to potential witnesses may also be charged under 18 U.S.C. § 1512.[9]

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[7] The requirement that the government prove that a defendant knows that a person is a potential witness would furnish scant protection, since the circumstances themselves render each person to whom a putative defendant speaks a "potential" witness.

[8] *See, e.g., United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Haggard*, 41 F.3d 1320 (9th Cir. 1994); *United States v. International Brotherhood of Teamsters*, 964 F.2d 1308 (2d Cir. 1992); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953).

[9] The record suggests instead that the government's resort to Section 1503 was nothing more than an exercise in artful pleading. Judge Aguilar was charged initially with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), through a pattern of racketeering that allegedly included the false statements to the FBI agents. Although Section 1503 is a RICO predicate offense, *see* 18 U.S.C. § 1961(1), Section 1001 is not. *Ibid.* While the conduct at issue here could have been charged under Section 1001, such an allegation would not have buttressed the government's efforts to contrive a RICO allegation. Circumventing Congress' intent to *limit* the scope of the RICO statute, however, is a particularly poor reason to *expand* the scope of Section 1503.

2. *The Terms of the "Omnibus Clause" Do Not Extend the Scope of the Statute to False Statements to Potential Witnesses*

Acknowledging that its construction of Section 1503 is unsupported by prior decision or the specific prohibitions of Section 1503, petitioner relies instead on the broadest possible construction of the terms "corruptly . . . endeavors to influence" to reach the conduct alleged here. The government contends that false statements to a potential witness are covered by Section 1503 because they can have the "same effect" as other acts covered by the statute. Gov't Br. 21. Thus, according to petitioner, *any* act done with the requisite intent that has or might have the effect of "influenc[ing], obstruct[ing] or imped[ing] the due administration of justice" falls within the "omnibus clause." Gov't Br. 16-17, 19-21. It is impossible to reconcile this construction of the "omnibus clause" with the balance of Section 1503 or the statutory scheme of which it is a part.

The "omnibus clause" must be interpreted in light of the rest of the statute. *See Smith v. United States*, 113 S. Ct. 2050, 2056 (1993). Section 1503 contains two tiers or "branches," *see Pettibone*, 148 U.S. at 204-05, prohibitions of specific conduct followed by the omnibus or "residual" clause. *See e.g. United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984); *United States v. Jeter*, 775 F.2d 670, 675 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986). "[A] sensible and long-established maxim of construction limits the way we should understand" provisions, like the "omnibus clause," that round out a list of specific offenses. *Holder v. Hall*, 114 S. Ct. 2581, 2604 (1994) (Thomas, J., concurring). The principle of *ejusdem generis* dictates that "a general statutory term should be understood in light of the specific terms that surround it," *Hughey v. United States*, 495 U.S. 411, 419 (1990), and thus "should be understood

to refer to items belonging to the same class that is defined by the more specific terms in the list." *Holder*, 114 S. Ct. at 2604. The Ninth Circuit therefore correctly held that the "omnibus clause" must be interpreted in light of the specific offenses listed in Section 1503. Pet. App. 23a n.9.

When the "omnibus clause" is properly viewed in light of the specifically enumerated offenses, it becomes clear that its reach does not extend to false statements to potential witnesses. The enumerated offenses include:

> (a) attempting "to influence, intimidate, or impede any grand or petite juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate;"
>
> (b) injuring "any such grand or petite juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror;" and
>
> (c) injuring "any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties."

18 U.S.C. § 1503.

Most immediately apparent from this list is the absence of any reference to obstruction of witnesses. All others protected by the specific prohibitions in Section 1503 -- jurors, court officers and magistrates -- are responsible for administering justice. Witnesses cannot be said to administer justice, and "potential" witnesses are even farther removed.

Some courts have held that limiting the reach of the "omnibus clause" to acts similar in *type*, as the doctrine of *ejusdem generis* requires, rather than acts similar in *result*, would render the "omnibus clause" "superfluous." *See, e.g., United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir.) (citing *United States v. Walasek*, 527 F.2d 676, 679 & n. 11 (3d Cir. 1975)), *cert. denied*, 439 U.S. 834 (1978).[10] But exactly the opposite is true.

If the "omnibus clause" is construed to include all acts that might adversely affect the administration of justice, it is the enumerated offenses in Section 1503 that are rendered superfluous. Moreover, so construed, the "omnibus clause" of Section 1503 obliterates the balance of the statutory scheme addressed to obstruction of justice.[11] For example, resisting a process server; resisting an extradition agent; influencing a juror in writing; theft of a record relating to the reversal of a judgment; picketing a courthouse; recording or observing jury deliberations; influencing a victim, witness or informant; or retaliating against a witness, victim or informant are all acts that would fall within the scope of the "omnibus clause" as interpreted by the government. Yet Congress has passed a specific

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[10] *Ejusdem generis* does *not* mean, and the Ninth Circuit did *not* hold, as the government implies, that the omnibus clause is "limit[ed] . . . to the specifically defined offenses in other clauses of Section 1503." Gov't Br. 27. Rather, as the Ninth Circuit held, the omnibus clause properly functions as a residual clause, bringing within the scope of the statute those acts that are similar in kind, such as an attorney's forgery of a court order to steal from his clients, *cf. United States v. London*, 714 F.2d 1558, 1566-67 (11th Cir. 1983), rather than in result.

[11] Section 1503 is an integral part of a thorough and precisely constructed corpus of seventeen obstruction statutes, *see* 18 U.S.C. § 1501 *et seq.*, apart from which it may not be read. See *Muniz v. Hoffman*, 422 U.S. 454, 468 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

obstruction statute to address each of these acts individually.[12]

The rule of *ejusdem generis* is useful precisely because it prevents the "omnibus clause" from "swallowing up" the rest of the statute, as well as the statutory scheme of which it is an integral part. *See Peretz v. United States*, 501 U.S. 923, 955 (1991) (Scalia, J., dissenting). By contrast, in order to construe the "omnibus clause" broadly enough to reach Judge Aguilar's conduct, the government must dispense with any limiting principle that stops short of absorbing the whole statutory scheme.

Finally, even if in some circumstances Section 1503 might reach out to cover a prospective witness, a mere false statement is not one of those circumstances. The phrase "corruptly . . . endeavors to influence, obstruct or impede," on which the government relies, should not be construed in isolation, but rather with reference to the particular activities that the statute prevents. *See King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citations omitted); *see also United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173, 2182 (1993).[13] Both the

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[12] *See* 18 U.S.C. §§ 1501 (process servers); 1502 (extradition agent); 1504 (influencing a juror by writing); 1506 (theft or alteration of record or process); 1507 (picketing or parading); 1508 (recording or observing jury deliberations); 1512 (influencing witnesses, victims and informants); 1513 (retaliating against witness, victims and informants).

[13] In fact, standing alone, the phrase "corruptly . . . endeavors to influence, obstruct, or impede" may be unconstitutionally vague in that it does not provide sufficient notice that it prohibits false statements to a prospective witness and does not provide sufficient guidelines for law enforcement -- any act that a particular law enforcement officer perceives to be "perverted" or "depraved" or done to achieve some sort of advantage might be subject to punishment. *See* Pet. App. 22a-23a n.8 (finding the term "corruptly" vague on its face as applied to false statements to Congress under 18 U.S.C. § 1505) (citing *United States v. Poindexter*, 951 F.2d 369, 377-79 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992)); *see also Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

first "branch" of Section 1503 and the "omnibus clause" itself list other specifically prohibited activities. In addition to punishing one who "corruptly . . . endeavors to influence, obstruct, or impede," the statute prohibits the use of "threats," "force," "threatening letter or communication," "intimida[tion]," and "injur[y]" to "person or property." 18 U.S.C. § 1503.

It is both logical and customary to give related meanings to words and phrases grouped together. *See Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (explaining doctrine of *noscitur a sociis*). While this rule of construction is not "inescapable," it is "wisely applied" "in order to avoid the giving of unintended breadth to the Acts of Congress" where a phrase like "corruptly influence" is "capable of many meanings."[14] *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

As the Ninth Circuit found, "false and misleading statements to the FBI" are "very different from the other types of activities enumerated in section 1503." Pet. App.

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[14] An endeavor to "corruptly influence" cannot mean simply any endeavor that is intended to obstruct the due administration of justice, as the government's analysis implies. Gov't Br. 16-19. The term "corruptly" may not be treated as "surplusage," particularly since it "describe[s] an element of a criminal offense." *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994). It must have some meaning, if only "because otherwise the statute would criminalize all attempts to 'influence'" a grand jury, petit jury or a court, "an absurd result that the Congress could not have intended in enacting the statute." *United States v. Poindexter*, 951 F.2d 369, 377-78 (D.C. Cir. 1991) (interpreting nearly identical terms in 18 U.S.C. § 1505), *cert. denied*, 113 S. Ct. 656 (1992).

23a. All of the prohibited activities involve varying degrees of forceful persuasion. A simple false statement does not.[15]

B. The Amendment Of Section 1503, The Enactment Of Section 1512 And All Relevant Legislative History Demonstrate That Section 1503 Does Not Apply To The Conduct Charged

As we set forth above, Section 1503 never has encompassed, nor can it, in accordance with its terms, be stretched to encompass the conduct charged here. However broadly it might once have been construed, any doubts about that proposition were laid to rest by the enactment in 1982 of the Victim Witness Protection Act, Pub. L. No. 970291, 96 Stat. 1248 (1982) ("VWPA"). In the VWPA, Congress took two steps of critical importance to resolving the issue presented by the petitioner. First, in a new Section 1512, Congress substantially expanded the protections afforded to potential, current, or former witnesses. In particular, in Section 1512, Congress prohibited engaging in "misleading conduct" . . . "toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in

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[15] As the Ninth Circuit noted in conclusion, even if the government's interpretation of Section 1503 were possible because of some ambiguity, "the more lenient construction is required." Pet. App. 24a-25a. This Court has long emphasized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Thus, if any "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute," *Moskal v. United States*, 498 U.S. 103, 108 (1990), it should be construed narrowly. *See also United States v. Granderson*, 114 S. Ct. 1259, 1267 (1994).

an official proceeding."[16] Elsewhere in the VWPA, Congress defined "misleading conduct" to include "making a false statement." 18 U.S.C. § 1515(a)(3)(A).[17] As its plain terms suggest, in this new Section 1512, Congress addressed the conduct charged here. Simultaneously, Congress amended Section 1503 to delete *all* references to witnesses, placing all prohibited conduct towards witnesses formerly in Section 1503, together with other new protections for witnesses, in the new Section 1512.[18]

The lower courts later split over the question of whether the "omnibus clause" of Section 1503, the terms of which were not changed, continued to apply in any fashion

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[16] As enacted in 1982, Section 1512 provided in relevant part:

> (a) Whoever knowingly uses intimidation or physical force, threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to --
>
> (1) influence the testimony of any person in an official proceeding
>
> * * *
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(a)(1982) (currently 18 U.S.C. § 1512(b)(1)).

[17] Section 1515 provides in relevant part:

> (a) As used in sections 1512 and 1513 of this title and in this section --
>
> * * *
>
> (3) the term "misleading conduct" means --
>
> (A) knowingly making a false statement;

18 U.S.C. § 1515(a)(3)(A).

[18] The former text of Section 1503, as it stood prior to the enactment of the VWPA, is set out at Pet. App. 19a n.5.

to conduct concerning witnesses.[19] However, the plain terms of the statutes, the unambiguous legislative history, and accepted canons of statutory construction leave one proposition beyond peradventure: Congress most certainly did not intend that conduct expressly encompassed within Section 1512 could also be prosecuted -- if it ever could have been -- under the "omnibus clause" of Section 1503.

1. The Court Should Give Effect to Congressional Intent to Remove From Section 1503 All Conduct Addressed in Section 1512.

In 1982, Congress did all it could to carry out its plan to address all potentially obstructive conduct towards witnesses in Section 1512. In addition to removing any reference to witnesses from Section 1503, Congress expressly addressed an expanded array of obstructive conduct towards witnesses -- including the precise conduct charged here -- through Section 1512. There is ample support for the view that Congress intended to remove *all* obstruction relating to witnesses from the scope of Section 1503. The

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[19] *Compare United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984) *with United States v. Lester*, 749 F.2d 1288, 1295-96 (9th Cir. 1984) *and United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986). The issue in these cases was whether forms of witness tampering that were *not* covered by Section 1512 might still be punished under Section 1503. Whether conduct that *is* expressly covered by Section 1512 can still be punished under Section 1503, which is the issue in this case, is a different question. At least two circuits have held that Section 1503 covers *all* types of witness-related obstruction, despite the enactment of Section 1512. *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992); *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1348 (1993). Respondent respectfully suggests that these latter cases were wrongly decided for the reasons discussed.

Court, however, need not reach that issue. The enactment of the VWPA unmistakenably supports the view that Congress never intended to leave within the "omnibus clause" of Section 1503 conduct expressly addressed in Section 1512, including false statements to witnesses. The removal of all references to witnesses from Section 1503 and the inclusion within Section 1512 of the precise prohibition that petitioner attempts to infer from the "omnibus clause" of Section 1503 is compelling evidence of Congressional intent to address that conduct only within Section 1512.[20]

This is not, as petitioner misleadingly suggests, a question of "repeal by implication." It is, rather, a straightforward application of the principle, reaffirmed only recently by this Court, that courts may not ignore such direct and express congressional reorganization of a legislative scheme. *See United States v. Fausto*, 484 U.S. 439 (1988). The issue in *Fausto* was whether a non-veteran, excepted service federal employee could maintain an action for back pay connected with a suspension for misconduct in the United States Claims Court under the Tucker Act and the Back Pay Act, despite the subsequent passage of the Civil Service Reform Act of 1978 ("CSRA"). *Id.* at 440-43. Prior to enactment of the CSRA, the Claims Court had relied on a broad provision of the Back Pay Act to assert jurisdiction over back pay actions of employees like Fausto. *Id.* at 454. The CSRA, "'comprehensively overhauled the civil service system'" and provided detailed remedies for similar actions, but contained no provision for judicial or administrative review of claims by non-veteran excepted

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[20] As we set forth in Section I.A above, respondent submits that Section 1503 has never encompassed false statements to potential witnesses. The effect of the VWPA on the scope of Section 1503 is relevant only if the Court finds that this conduct might once have been charged under Section 1503, although it is undisputed that it never was.

service employees suspended for misconduct. *Id.* at 443 (citing *Lindahl v. OPM*, 470 U.S. 768, 773 (1985)).

The Court held that Congress' decision *not* to provide a remedy for such claims in the CSRA meant that the Back Pay Act no longer could be interpreted to give the Claims Court jurisdiction over those claims. *Id.* at 455. This holding came over the objection, repeated by the government here, Gov't Br. 25-28, that the doctrine of "repeal by implication" precluded a review of the settled interpretation of the Back Pay Act. The Court reasoned:

> Repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. [] But repeal by implication of a legal disposition implied by a statutory text is something else. The courts frequently find Congress to have done this -- whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. . . All that we find to have been "repealed" by the CSRA is the judicial interpretation of the Back Pay Act. . .

Fausto, 484 U.S. at 453 (citations omitted).[21] In at least four distinct respects, the Congressional intent to limit the scope of Section 1503 is far more compelling than the circumstances presented in *Fausto*.

First, Congress did "specifically address language on the statute books that it wanted to change" by removing *all* references to witnesses from Section 1503. There was

[21] *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (courts should be "reluctant [] to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.").

nothing "implied" or "implicit" about the amendment of Section 1503 and the enactment of Sections 1512 and 1515. The issue in this case is thus not *whether* Section 1503 was amended by the VWPA, but *what those amendments mean*.[22]

Second, both Section 1503 and Section 1512 are part of the same legislative scheme; the Court need not speculate about whether Congress understood the effect that the enactment of Section 1512 would have on Section 1503. Rather, as the interplay between the statutes and the legislative history (discussed below) plainly reflects, Congress intended to construct the new Section 1512 at least in part at the expense of the former scope of Section 1503.

Third, the conduct at issue is covered expressly by Section 1512; the Court need not reason from a failure to speak on the subject, as it did in *Fausto*, but instead can discern from the enactment of a specific provision addressing

[22] There is no reason to infer a contrary result from the fact that Congress did not amend or repeal the omnibus clause when it removed the specific references to witnesses from Section 1503. *Cf.* Gov't Br. 24-25. Prior to 1982, witnesses tampering was addressed in Section 1503 by the specific terms that Congress removed from that statute, not by the omnibus clause. None of the pre-1982 witness cases on which the government relies gives any indication that the omnibus clause, as opposed to the specific witness provisions, provided grounds for prosecution of the offense in question. Further, the omnibus clause plays an important role in the scheme of obstruction statutes after the 1982 amendment. It encompasses much conduct that is unrelated to witnesses or even to conduct covered by the other specific obstruction statutes. *See, e.g., United States v. London*, 714 F.2d 1558 (11th Cir. 1983) (forgery of court order); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of subpoenaed records); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (violation of grand jury secrecy), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Griffin*, 589 F.2d 200 (5th Cir.) (false testimony), *cert. denied*, 444 U.S. 825 (1979).

the conduct in question how and where Congress wished to address the matter.

Finally, there is no directly relevant judicial interpretation to "repeal," as there was in *Fausto*. To the contrary, we need not ask this Court to reject any judicial interpretations applying Section 1503 to the conduct charged here -- although that result would be warranted under *Fausto* -- because *no* court ever applied Section 1503 to false statements to a potential witness prior to 1982.

In short, *Fausto* teaches that it is both desirable and proper to give effect to congressional intent by recognizing the limitations effected in one statute by later and more comprehensive legislation addressing the identical issue. It would be fairer to characterize petitioner's argument as "expansion by negative inference," than to label our claim as one based upon "repeal by implication."[23]

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[23] This case thus bears little resemblance to the two cases cited by the government as "parallel" on repeal by implication. *See* Gov't Br. 27 (citing *United States v. Noveck*, 273 U.S. 202 (1927); *Edwards v. United States*, 312 U.S. 473 (1941)). In *Noveck* the argument was that a tax statute partially repealed the general perjury statute as it applied to tax matters; and in *Edwards*, the argument was that a securities statute partially repealed the general mail fraud statute as it applied to securities. In neither case had Congress actually amended the more general statute by removing all language related to the area of coverage of the more specific statute, as Section 1503 was amended, nor were the statutes at issue in those cases part of a unified statutory scheme, as they are here. *Edwards* and *Noveck* are thus inapposite.

2. Legislative History of the VWPA Confirms that Congress Intended to Remove Witness Tampering From the Scope of Section 1503

The legislative history of the VWPA strongly supports our interpretation of Section 1503. During floor debate on the VWPA, Senator Heinz, a primary backer of the legislation, compared the Senate bill to the House bill, the latter of which was enacted as the VWPA: "The House version [of the VWPA] amends section 1503 so it will *make no mention of, and provide no protection to*, supenaed [sic] witnesses." 128 Cong. Rec. 26,810 (1982) (emphasis supplied). "By amending section 1503 in this way," the Senator continued, "the proposal will contribute to a clearer and less duplicative law." *Id.*

The government devotes three pages to an attempt to persuade the Court that Senator Heinz' remarks mean something other than what they say. *See* Gov't Br. 29-32 & n. 4. Petitioner notes that the Senate version of what became Section 1512 contained an "omnibus clause," which was, if anything, broader than the "omnibus clause" in Section 1503 and made no mention of witnesses. *Id.* at 29-30 & n. 4 (quoting Senate bill). From Senator Heinz' observation that this "omnibus clause" was "beyond the legitimate scope" of the VWPA and "duplicative of [o]bstruction of justice statutes already in the books," *id.* at 31, petitioner concludes that Congress was relying "on the continued applicability of Section 1503 as the basis for removing what would have been 'duplicative' coverage in Section 1512." *Id.* To the extent that the "omnibus clause" of Section 1503 may still extend to acts that are not covered by Section 1512 or the other specific obstruction statutes, we need not take issue.

The remainder of the government's argument, however, simply makes no sense. Its suggestion that

Congress intended the "omnibus clause" of Section 1503 to address conduct specifically covered by Section 1512 cannot be reconciled with Senator Heinz' comment that the proposed omnibus provision in Section 1512 was both "duplicative" of Section 1503 and "beyond the legitimate scope of this witness protection measure." If the proposed "omnibus clause" in Section 1512 concerned matters "beyond" the scope of the remainder of Section 1512, but was "duplicative" of the "omnibus clause" in Section 1503, then it follows that Senator Heinz likewise must have understood that the "omnibus clause" of Section 1503 was "beyond the [] scope" of witness protection. If so, it simply cannot be relied upon to address the conduct at issue here, which falls squarely within the "witness protection" provisions of Section 1512.

Petitioner suggests, apparently in the alternative, that by removing references to witnesses from Section 1503, Congress intended to remove only "specific duplication." Gov't Br. 31. That intent, according to petitioner "does not suggest that Congress intended to remove all witness-related offenses from the scope of Section 1503, or to limit in some other way the scope of the 'omnibus clause' of Section 1503." Gov't Br. 31-32.

If the government is correct, either Congress eliminated duplicative provisions from the specific provisions of Section 1503 but intended *sub silentio* to prohibit the same conduct through the "omnibus clause;" or, alternatively, that Congress eliminated "specific duplication" from all of Section 1503 but left other (presumably "general") duplication behind to reside in the "omnibus clause". Under this latter view, the "omnibus clause" of Section 1503 covers all conduct that is also covered by the specific provisions of Section 1512, except, apparently, for those provisions of Section 1512 that formerly resided in Section 1503. Petitioner's interpretation of Section 1503 thus fashions

either a wholly duplicative statute or a statute whose scope is so unclear that courts will forever after have to look to language that Congress *removed* in order to ascertain what *remains*.[24] That position is hard enough to articulate, much less to justify. It is anything but the "clearer and less duplicative law" that Senator Heinz described. 128 Cong. Rec. 26,810 (1982).[25]

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[24] If petitioner means by "specific duplication" to suggest that Congress intended to remove from Section 1503 conduct specifically addressed in Section 1512, the argument is unavailing. While that position might leave some residual scope for Section 1503 concerning witnesses, it surely does not encompass the conduct charged here, which is specifically addressed in Section 1512(b)(1).

[25] In enacting the VWPA, Congress took stock of what it understood to be the existing scope of Section 1503. The Judiciary Committee Report accompanying the Senate's version of the VWPA noted that certain obstruction statutes, including Section 1503, "relate to coercive acts intended to tamper with witnesses." S. Rep. No. 532, 97th Cong., 2d Sess., at 14 (1982). The Committee explained that Section 1503 requires:

> . . . a relatively high threshold of seriousness for commission of a crime. For instance, section 1503 requires corruption, threats or force . . . [and does not] proscribe conduct knowingly and maliciously hindering, delaying, preventing or dissuading testimony or reports to law enforcement officers. . . .
>
> . . . Testimony given to the ABA suggested that sometimes innocent acts, such as telephoning a victim to say hello, coming to his home, or even driving a motorcycle by, may be extremely effective in preventing a victim or witness from testifying. This type of activity is not covered by section 1503 which requires corruption, threats or force for an offense.

Id. at 14, 15.

The Judiciary Committee thus indicated that hindering, delaying, preventing or dissuading a witness from testifying, and even verbally

3. *The Subsequent Amendment of Section 1512 Confirms that Congress Intends to Cover Witness Tampering in Section 1512, Not Section 1503*

Congress again turned its attention to the obstruction statutes in 1988 to resolve the conflict among the circuits that had arisen over whether forms of non-coercive witness tampering left unaddressed in Section 1512 were prohibited by the "omnibus clause" of Section 1503. In so doing, it reaffirmed its intent to confine all issues relating to the obstruction of witnesses to Section 1512, especially conduct expressly covered by its specific prohibitions. As Congress added the phrase "corruptly persuades" to Section 1512 to address such non-coercive conduct formerly unaddressed by Section 1512, it stated:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. § 1512(b), rather than under the [omnibus] clause of 18 U.S.C. § 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in prosecutions being brought under 18 U.S.C. § 1512(b).

H.R. Rep. No. 100-169, 100th Cong., 1st Sess., at 12 (1987). This legislative history confirms what is obvious from the language of both the 1982 and the 1988

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harassing a witness do not amount to "corruptly endeavoring to influence" under Section 1503. Such a view would necessarily exclude the conduct alleged here.

amendments and Senator Heinz' statements: Since 1982, Section 1512 provides the exclusive avenue for the prosecution of all forms of witness tampering specifically addressed by its terms.[26]

II. SECTION 2232(c) DOES NOT PUNISH DISCLOSURE OF A WIRETAP APPLICATION OR AUTHORIZATION THAT HAS EXPIRED

Judge Aguilar was convicted under 18 U.S.C. § 2232(c) for disclosing the existence of a wiretap application that had expired eight months before and was never renewed. As the Ninth Circuit held, however, Section 2232(c) does not extend to the disclosure of an expired wiretap. Petitioner now asks this Court to reject the Ninth Circuit's sound interpretation of the statute and instead to construe it contrary to its plain terms, based upon an unexpressed purpose totally absent from the statute or its legislative history.

Section 2232(c) protects the secrecy of authorizations to intercept electronic communications while such

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[26] The 1988 amendment to Section 1512 also furnished support for the Ninth Circuit's ruling in another way. When Congress amended Section 1512 to cover the arguable gap remaining in its coverage due to the absence of a prohibition directed at certain kinds of non-coercive witness tampering, it spoke to the meaning of the term "corruptly . . . endeavors to influence." As noted above, all of the other forms of conduct prohibited by Section 1503 involve an element of persuasion. As the Ninth Circuit reasoned, by choosing the phrase "corrupt persuasion" to fill the hole, Congress confirmed that the nearly identical phrase "corruptly influence" in Section 1503, like all the other prohibited activities, must involve an element of persuasion. Pet. App. 21a-22a. Since false or misleading statements to a witness cannot fairly be characterized as "corrupt persuasion," the *en banc* court correctly concluded that Section 1503 does not cover such conduct. *Id.* at 22a-24a.

authorizations are in effect or while applications for authorization are pending. Once a wiretap has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure. While it may be possible, of course, to conceive of a broader statute, or one protecting different interests, Congress did not enact one. Section 2232(c) simply does not reach Judge Aguilar's conduct. Petitioner cannot supply a reasoned interpretation of the statute, a single precedent, or any persuasive legislative history that would support its effort to apply Section 2232(c) to conduct that it does not proscribe.

A. Judge Aguilar Was Convicted Of Disclosing The Existence Of A Wiretap Application That Had Expired And Was Not Renewed

Judge Aguilar was convicted of disclosing a wiretap authorization that expired more than eight months before its disclosure. Both the record and all opinions below make that abundantly clear. *See* J.A. 108-110; *see also* Pet. App. 5a, 32a, 70a. Contrary to the petitioner's assertion, Gov't Br. 44, there is *no evidence* in the record that the April wiretap "was reauthorized and extended further." Although other wiretaps were authorized on Tham's phones, *see* Gov't Exh. 1B, there is *no evidence* that those further wiretaps were "extensions" pursuant to 18 U.S.C. § 2518(5) of the April wiretap; *no evidence* that Chapman was named as an interceptee of those wiretaps; and *no evidence* that Judge Aguilar had knowledge of these other wiretaps. In any event, Judge Aguilar was charged *only* with disclosing the April 1987 wiretap.

In short, Judge Aguilar was convicted of disclosing on February 9, 1988, a wiretap that had been authorized in April of 1987, that expired in May of 1987, and that was never renewed or extended.[27]

B. The Plain Language Of Section 2232(c) Is Inconsistent With The Interpretation The Government Proposes And The Interests It Seeks To Protect

"In determining the scope of a statute, [the Court] look[s] first look[s] to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). The Court need look no farther than the language of Section 2232(c) to determine its scope.

18 U.S.C. § 2232(c) provides:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, *in*

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[27] Within ninety days after a wiretap authorization expires, the authorizing court is required to serve an inventory on the interceptee, informing that person of the existence of the wiretap, its effective dates and whether any information was intercepted. 18 U.S.C. § 2518(8)(d). On an *ex parte* showing of good cause, the authorizing judge may postpone the serving of this inventory. *Ibid.* On the date of the disclosure in this case, although the wiretap authorization had expired, the authorizing Judge had not yet served the Section 2518(8)(d) inventory on Chapman.

> *order to obstruct, impede, or prevent such* ***interception***, gives notice or attempts to give notice of ***the possible interception*** to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis supplied). In the only reported opinion to construe this provision, the *en banc* court confirmed what is clear from the plain language of the statute itself: "[T]he purpose of the statute is to prevent interference with 'possible interception.'" Pet. App. 9a. Once a wiretap has expired or has been denied, the Ninth Circuit reasoned, there is no "possible interception" to disclose or to attempt to disclose. *Id.* at 8a-9a. The "plain language" of Section 2232(c) does not prohibit the conduct alleged in this case. The narrow purpose of the statute is further evidenced by the statute's intent requirement, which limits punishable disclosures to those undertaken with the intent to interfere with "such interception" of which the defendant "has knowledge." *Ibid.* Under the circumstances, the disclosure of an expired wiretap not only fails to violate the terms of the statute, it fails to implicate any interest protected by Section 2232(c).[28]

As the Ninth Circuit stated, "[t]he issue in this case is . . . whether the wiretap information [Judge Aguilar] disclose[d] was prohibited." *Id.* at 13a. This case most certainly does *not* "center[] on the intent element of the offense," as the government suggests. Gov't. Br. 38. In

[28] The fact that a different or successor wiretap may be in place at the time of the disclosure, and, indeed, might be impeded by a disclosure does not change the analysis. Congress chose in Section 2232(c) to punish only those disclosures undertaken with the purpose of impeding "such interception" of which the defendant has knowledge. That a disclosure of one authorization might interfere with other interceptions is a risk that Congress elected not to address.

contrast to its previous position before this Court and the Ninth Circuit, petitioner devotes the bulk of its attention to a largely irrelevant discussion of the intent requirement and the sufficiency of the evidence. *Id.* at 36-45. Only as an afterthought does petitioner coyly concede that "[t]he court of appeals may also have believed that respondent's conduct did not satisfy the disclosure element of the offense, on the ground that there was no 'possible interception' at the time the disclosure was made." *Id.* at 46.[29]

The reasoning of the Court of Appeals is not so difficult to follow, since it tracks the very terms of the statute. The first and most crucial step of the *en banc* court's analysis was that the interception disclosed must be "possible." Pet. App. 8a-9a, 13a-15a. The government's claim that "[t]he court of appeals believed that the term 'such interception' . . . precluded a conviction in this case" is but a half-truth. The Ninth Circuit looked to the knowledge and intent requirements to determine which "possible interceptions" may not lawfully be disclosed. Since the statute requires knowledge of an application or authorization and a specific intent to disclose or attempt to disclose "such interception" of which the defendant has knowledge, the Ninth Circuit concluded that only the disclosure of a "possible interception" of which the defendant has knowledge violates the statute. Judge Aguilar did not disclose a "possible interception" under Section 2232(c),

[29] The government's misdirected presentation of the Ninth Circuit's holding and the issue for review is puzzling in light of its Petition for Certiorari, which correctly noted that "the court of appeals interpreted the statute to require proof that the precise application or authorization of which the defendant had knowledge was still pending or unexpired at the time the defendant made the disclosure," Pet. 22, and did not indicate that the intent requirement was a matter of serious dispute, much less the "center[]" of dispute. *See Id.* at 20-25.

because the wiretap of which he had knowledge expired eight months before.[30]

The petitioner has yet to furnish a plausible alternative explanation accounting, as it must, for all the terms of the statute. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). In its Petition for Certiorari, the government simply read the phrase "possible interception" out of the statute, asserting instead that "there is no basis in the statutory language for the court of appeals' requirement that [] obstruction be *possible* at the time the disclosure was made." Pet. 23 (emphasis supplied). Even in its own argument, however, the petitioner was unable to avoid using the very language of the statute to express the requirement it inexplicably claimed to be unable to locate.

Having failed at subtraction, petitioner has turned in its brief on the merits to the process interpretation through addition. According to the petitioner now, "[s]o long as the defendant *believed* it was 'possible' that an operational wiretap resulted or would result from the application of which he had knowledge at the time he made the disclosure, the disclosure element is satisfied." Gov't Br. 46 (emphasis added). This interpretation suffers from the same flaw as petitioner's earlier efforts -- it is not grounded in the terms of the statute. Section 2232(c) does not punish giving notice or attempting to give notice of an "interception the defendant

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[30] The government properly abandoned the contention it previously advanced in its Petition for Certiorari that the Ninth Circuit's holding means "the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication." Pet. 23. There is no dispute that Section 2232(c) punishes "attempts to give notice of [a] possible interception." 18 U.S.C. § 2232(c). "The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited." Pet. App. 13a.

believed to be possible;" it punishes notice or attempted notice of a "possible interception." 18 U.S.C. § 2232(c). The character of the interception is not relevant to the defendant's mental state, but to the *actus reus*.

It is precisely this fact that distinguishes this case from *United States v. Russell*, 255 U.S. 138 (1921), in which this Court held that a prosecution under the statutory predecessor to Section 1503 was not precluded by the failure of an indictment to allege that the person who was the object of an impermissible approach by the defendant had been selected or sworn as a juror. Focusing on the term "endeavor," this Court held that the defendant had the necessary intent, even if he could not achieve his goal. *Id.* at 143. Petitioner reasons that because the terms "in order to" in Section 2232(c) describes an intent requirement as broad as the term "endeavor," "the defendant can be found to have acted with the requisite intent even if he could not achieve his goal." Gov't Br. 40 (footnote omitted). As the Court of Appeals explained, however, Judge Aguilar's state of mind is simply not relevant. Pet. App. 13a. The term "possible" does not modify the notice that is given or defendant's state of mind. Rather, it defines and thus limits the class of interceptions that may not be disclosed without violating the statute. This court's decision in *Russell* cannot be stretched far enough span the distance between the statute Congress enacted and the conduct the government seeks to punish.[31]

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[31] The two panel members who dissented from the *en banc* court's holding likewise focused solely on the question of intent, to the exclusion of the remaining terms of the statute. The dissenters asserted that the *actus reus* is complete if the defendant "attempt[s] to warn someone *that an interception* of that person's telephone communications *is possible*." Pet. App. 26a. But Section 2232(c) does not punish "giving notice or attempting to give notice *that interception is possible;*" it punishes one who "gives notice or attempts to give notice of *the possible interception*."

The government's resort to legislative history fares no better. In support of the argument that Section 2232(c) should be applied to expired wiretaps, the government relies on a single word in a Senate Report on the Electronic Communications Privacy Act of 1986, of which the wiretap disclosure statute formed but a very small part. *See* S. Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588; Gov't Br. 41. The Senate Report, in summarizing the sense of the statute, notes that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was* or is the target of the interception." *Ibid.* (emphasis supplied). From the use of the term "was," the government contends that Section 2232(c) was intended to reach expired wiretaps. Gov't Br. 41.

As the *en banc* court concluded, resort to this legislative history is not appropriate, because "the language of the statute clearly expresses the congressional intent." Pet. App. 11a; *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (only if the statutory language is unclear may a court look to legislative history to determine its intent). Moreover, the Ninth Circuit's interpretation of the language of the statute is consistent, and the government's proposed interpretation inconsistent, "with the purpose of the Electronic Communications Act, as expressed in the Senate Report, which is 'to protect against the unauthorized interception of electronic communications,' so as to further 'guard against the arbitrary use of Government power to maintain surveillance over citizens . . .'" Pet. App. 11a (*citing* S.

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18 U.S.C. § 2232(c). In the same fashion as petitioners, the dissenters simply cannot get from here to there without redrafting the statute.

Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555).[32]

Lacking a plausible interpretation of the statute to support its position, petitioner is left to contend that the result compelled by the terms of the statute would constitute a "windfall defense." Gov't Br. 47. Its argument, however, is nothing more than an expression of frustration at the terms of a statute that it finds too narrow to meet its needs. It is equally possible to derive a list of "windfall defense[s]" from the terms of the intent requirement of Section 2232(c), which is the cornerstone of the petitioner's position. An individual who discloses an ongoing wiretap for the purpose of undermining *another* interception (or, alternatively, for the purpose of interfering with an ongoing criminal investigation or disseminating false information), for example, would likewise "escape conviction," Gov't Br. 47, since Section 2232(c) punishes only those disclosures undertaken for the purpose of interfering with "such interception" of which a person has knowledge. While these limitations may not comport with the government's preference, they nonetheless reflect a clearly expressed Congressional purpose to address only the risks to a planned or ongoing wiretap from disclosure of the authorization for that wiretap itself. Petitioner may wish that Congress enacted a broader statute, or one designed to protect different interests, but its

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[32] A careful reading of the sentence from the Senate Report on which the government relies suggests that it does little to advance petitioner's cause. The most that can be said about this sentence is that it represents a sloppy effort to capture the terms of Section 2232(c). It unarguably describes a statute different than the provision Congress adopted. The statute is plainly *not* limited -- as the language in the Senate Report suggests -- only to disclosures made to the "target of the interception." Rather, as all parties agree, the statute reaches disclosures made to *anyone* with the intent to impede the known interception.

arguments based on such wishful thinking shed no light on the meaning of Section 2232(c).[33]

C. The First Amendment Precludes Petitioner's Interpretation Of Section 2232(c)

This Court has made clear time and again that where the interests of the First Amendment and the government collide, the government bears the burden of demonstrating a compelling "state interest of the highest order" before it may punish the disclosure of information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). It is also well-established that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Communications Workers v. Beck*, 487 U.S. 735, 762 (1988). By seeking to extend the statute's

[33] The government also worries that if the Court were to hold that only disclosure or attempted disclosure of a "possible interception" constitutes a violation of the statute, a defendant would be able to "escape conviction" if the wiretap equipment malfunctioned or if the interceptee simply did not use the phone line. Gov't Br. 47. However, it is apparent on the face of the statute that Congress was concerned with legal possibility, not factual possibility. A wiretap is always mechanically possible. But the knowledge and intent requirements of Section 2232(c) demonstrate that authorized wiretaps and pending applications for wiretaps are "possible" interceptions protected by the statute, whether or not they are operating mechanically, because they are legally "possible." The holding of the *en banc* court would not preclude a prosecution under the circumstances proposed by the petitioner; and, in any event, these hypothetical circumstances are from those presented for decision in this case.

prohibitions against disclosure indefinitely, long after any interest protected by Section 2232(c) may be jeopardized, petitioner's construction of the statute would encompass a "substantial amount of constitutionally protected conduct," Pet. App. 12a, without identifying any countervailing interest that warrants that result. *Id.* at 11a. Both the First Amendment and this fundamental rule of construction counsel against petitioner's interpretation.[34]

Faced with the burden of identifying within Section 2232(c) a compelling government interest warranting a prohibition against disclosure of expired wiretaps, the petitioner has tried on a number of hats before finding

[34] The Court has specifically reserved the question of whether the First Amendment permits the criminal punishment of "one who secures . . . information by illegal means and thereafter divulges it." *Landmark Communications, Inc. v. United States*, 435 U.S. 829, 837 (1978). The government asserts that it may, relying on *Snepp v. United States*, 444 U.S. 507, 511 & n.6 (1980) and Fed. R. Crim. P. 6(e). Gov't Br. 48.

That issue, however, is nowhere present in this case. Contrary to the petitioner's insinuations this is not a case in which the defendant was found to have disclosed information received in his official capacity. *Ibid.* As the government has elsewhere acknowledged, Pet. App. 43a, 87a, 91a, Judge Aguilar's suspicions about electronic surveillance were founded at least in substantial part on the fact that the government chose to conduct public surveillance of Chapman from a car parked in front of Judge Aguilar's house. Concerned about the very issue that petitioner raises now, Judge Aguilar requested at trial an instruction that would have required the jury to find that he had disclosed knowledge gained from "confidential information, information derived from the judges employment." J.A. 127. Petitioner, however, successfully *opposed* this instruction, later arguing that the nature or source of Judge Aguilar's knowledge was "irrelevant." *Id.*; Brief for the United States of America (9th Cir. Aug. 9, 1991), at 38. Having expressly eschewed this doctrine at trial, and having relied before the jury on information that cannot conceivably be characterized as "confidential," *see* J.A. 112-116, it is particularly unseemly for petitioner to assert a contrary position before this Court.

something that it hopes will fit. Before the Ninth Circuit, the government argued that it had a compelling interest in protecting law enforcement interests generally or in future efforts at electronic surveillance. *See* Brief for the United States of America (9th Cir. Aug. 9, 1991), at 38-39; *see also* Pet. App. 39a. Recognizing that Section 2232(c) does not even purport to protect these interests -- since by its terms it protects only attempts to interfere with the particular interception that has been disclosed -- the government retreated from that argument in its Petition for Certiorari. Instead, it argued there that the government has a compelling interest in the protection of the secrecy of extensions and re-authorizations of wiretaps. Pet. 22.

Even if the terms "possible interception" were so construed, however, the interests protected by Section 2232(c) would lapse when the extensions or reauthorizations themselves expired. Nothing in this construction assists in identifying a government interest in an indefinite prohibition against disclosure, nor would it furnish a basis for applying the statute to the facts of this case, since there is *no* evidence that the wiretap was extended or re-authorized. Pet. App. 5a; *see also* Part II.A, *supra*.[35]

In its most recent posture, petitioner now focuses on the intent element of the offense, suggesting that so long as a defendant undertakes a disclosure with the purpose of impeding an existing wiretap, any First Amendment concerns are obviated. Gov't Br. 48. As with its arguments based on

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[35] Petitioner now concedes that a "reauthorization" of a wiretap would in any event be relevant only if the defendant had knowledge of the "reauthorization" at the time of the disclosure, which petitioner does not allege. Gov't. Br. 44 & n.11. A defendant who had knowledge of the "reauthorization" would have knowledge of an unexpired wiretap and therefore indisputably would be covered by the statute. The issue is the government's interest in preventing the disclosure of knowledge of an expired wiretap absent further extensions or knowledge thereof.

statutory construction, petitioner puts more weight on the intent element of Section 2232(c) than it may safely carry. If petitioner's argument is that a defendant's *purpose* to defeat a valid governmental interest is sufficient, it has simply missed the point. Under the balancing test repeatedly applied by the Court, petitioner must point to the existence of a compelling government interest; it cannot satisfy that burden by reference to the interests a putative defendant may mistakenly believe to be implicated by his conduct.

Just as important, petitioner's emphasis on intent, distinguishing disclosures that may be punished from those that may not be based upon their purpose, turns the First Amendment on its head. Preventing expressions designed to challenge government conduct is neither a legitimate nor compelling interest; it is precisely such anti-government expression that "l[ies] at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

Despite its repeated efforts, the government cannot identify an interest within the scope of Section 2232(c) that would warrant punishing the disclosure of wiretaps that have long since expired. Its utter failure comports with common sense. Judge Aguilar's disclosure of a wiretap that had expired eight months before could not and did not jeopardize the wiretap itself, which is the only interest protected by Section 2332(c). The Ninth Circuit was on solid ground when it refused to embrace a gratuitous Constitutional confrontation by broadly construing Section 2232(c).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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